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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

In re: ) Case No. 08-36209-D-13L  
)  
KHAMMANY NADONE and ) Docket Control No. SS-2  
NALY PHONHLAMOUNGDY, )  
)  
Debtors. ) Date: April 21, 2009  
) Time: 1:00 p.m.  
) Dept: D

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MEMORANDUM DECISION

On February 26, 2009, the debtors herein, Khammany Nadone and Naly Phonhlamoungdy ("the debtors"), filed a Motion to Confirm Amended Plan, bearing Docket Control No. SS-2 ("the Motion"), by which the debtors seek confirmation of their First Amended Chapter 13 Plan ("the plan"), filed the same day. Secured and unsecured creditor The Golden 1 Credit Union ("the Credit Union") opposes the Motion. For the reasons set forth below, the court will deny the Motion.

I. INTRODUCTION

In the plan, the debtors propose to pay \$3,334.06 per month for 36 months, which will yield nothing for general unsecured creditors. Because the plan does not propose a 100% dividend to unsecured creditors, and because the Credit Union, as the holder of an unsecured claim, has objected, the plan must provide that all the debtors' projected disposable income to be received during the applicable commitment period will be applied to make

1 payments to unsecured creditors under the plan. 11 U.S.C.

2 § 1325(b)(1).<sup>1</sup>

3 The issue is whether the debtors have projected disposable  
4 income, as defined in § 1325(b)(2), such that they may obtain  
5 confirmation only if their plan proposes an applicable commitment  
6 period of five years, under § 1325(b)(4). If the debtors do not  
7 have projected disposable income, the "applicable commitment  
8 period" will not apply to them, and a three-year plan may be  
9 confirmed, despite the fact that the debtors, by their own  
10 admission, are above-median income debtors. Maney v. Kagenveama  
11 (In re Kagenveama), 541 F.3d 868, 875 (9th Cir. 2008).

## 12 II. ANALYSIS

13 The answer derives from an analysis of the debtors' Amended  
14 Chapter 13 Statement of Current Monthly Income and Calculation of  
15 Commitment Period and Disposable Income, Form B22C, filed  
16 February 26, 2009 ("Amended Form B22C" or "B22C"). The Credit  
17 Union contends that the debtors have used inappropriate figures  
18 in the B22C, and that when the figures are corrected, the debtors  
19 have disposable income, and thus, must propose a five-year plan.

### 20 A. The Deduction for Taxes

21 The Credit Union contends the debtors' deduction for taxes,  
22 on line 30 of the B22C, \$1,280, should instead be \$133.67, which  
23 would result in a positive monthly disposable income.

24 The Credit Union's figures are based on the debtors' actual  
25 "total tax," as shown on their 2007 federal and state income tax

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26  
27 1. Unless otherwise indicated, all Code, chapter, section  
28 and Rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-  
1532, and to the Federal Rules of Bankruptcy Procedure, Rules  
1001-9037.

1 returns. However, those returns do not reflect deductions from  
2 the debtors' income for social security taxes, Medicare taxes,  
3 and state disability insurance ("SDI"). These latter deductions  
4 are appropriate for inclusion on line 30, along with income tax  
5 deductions.

6 The debtors have submitted their 2008 federal and state  
7 income tax returns (without attachments) and a group of employer  
8 pay advices. The debtors' income tax liability, state and  
9 federal, using the figures in the tax returns, totals \$6,429, or  
10 an average of \$536 per month.

11 The debtors' pay advices for their primary jobs reflect  
12 their year-to-date deductions for social security taxes, Medicare  
13 taxes, and SDI through roughly the end of October; their pay  
14 advices for their second jobs run through October 11 and October  
15 19, respectively. Using a divisor of 10 for the primary jobs,  
16 and divisors of 9-1/3 and 9-2/3, respectively, for the second  
17 jobs, the averages for the debtors' social security tax, Medicare  
18 tax, and SDI deductions total \$714 per month. Thus, the grand  
19 total of deductions for all taxes -- state and federal income  
20 taxes, social security taxes, Medicare taxes, and SDI -- is an  
21 average of \$1,250 per month, just \$30 less than the figure the  
22 debtors used.<sup>2</sup>

### 23 B. The Increased Household Size

24 The Credit Union's second argument carries more weight. In  
25 the Amended Form B22C, the debtors list their household size as  
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27 2. Using the pay advices rather than the tax returns for  
28 the state and federal income tax deductions results in an average  
of \$1,245 per month for all these deductions.

1 eight, whereas in an earlier version, filed with the petition on  
2 November 5, 2008, they had reported a household size of six.  
3 According to the debtors' I-schedule, the household is comprised  
4 of the debtors and their four children. The household of eight,  
5 as listed on the Amended Form B22C, includes the parents of  
6 debtor Naly Phonhlamoungdy, who reside with the debtors and their  
7 children.

8 As a result of this change, the Amended Form B22C lists  
9 expense deductions on lines 24A and 24B based on the national  
10 standards for a household of eight rather than six. These  
11 deductions are higher by a total of \$638 than the deductions on  
12 the debtors' original Form B22C. The Amended Form B22C does not  
13 report the parents' income.

14 This change raises two concerns -- first, that the debtors  
15 changed the reported size of the household after the Credit Union  
16 objected to their original chapter 13 plan,<sup>3</sup> and second, that the  
17 debtors are using the increased household size as a means of  
18 increasing their expenses without at the same time including the  
19 parents' income as household income.

20 As a result of the Credit Union's objection to their  
21 original plan, the debtors reduced some of the expenses on their  
22 Form B22C -- those on lines 31, 44, 47, 50.<sup>4</sup> These reductions  
23 would have resulted in a positive monthly disposable income,  
24 which would have required a five-year plan. Thus, it appears the  
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26 3. The Credit Union's objection was overruled as moot, the  
27 chapter 13 trustee's separate objection having been sustained.

28 4. For three of the four lines, the changes made by the  
debtors correspond exactly to the changes sought by the Credit  
Union; for the fourth, line 47, they correspond substantially.

1 debtors sought a way to increase other expenses; what they hit  
2 upon was increasing their reported household size so they could  
3 increase the deductions on lines 24A and 24B.

4 The court finds this strategy -- modification of original  
5 sworn testimony to meet a creditor objection -- to be too  
6 expedient. At their meeting of creditors, the debtors testified  
7 that the parents resided in the debtors' residence, but had their  
8 separate income and separate expenses.<sup>5</sup> This is consistent with  
9 the household size of six reported in the debtors' original Form  
10 B22C -- the parents' income was not reported, but neither were  
11 they counted as household members for purposes of the expense  
12 deductions.<sup>6</sup> In both instances -- the original Form B22A and the  
13 meeting of creditors -- the debtors' testimony was given under  
14 penalty of perjury.

15 In their Amended Form B22C, in response to the Credit  
16 Union's objections, the debtors now report the increased  
17 household size for purposes of expenses only, but do not include  
18 the parents' income as a contribution to the household income.  
19 The difficulty with this tactic is that each time a party changes  
20 his or her story, absent a very good reason, the court attributes  
21 less credibility to the end product.

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22  
23 5. Declaration of Roxanne T. Daneri, filed March 24, 2009.

24 6. The debtors' original I-schedule, filed with their  
25 petition on November 5, 2008, is also consistent, in that they  
26 did not list the parents as their dependents, whereas in an  
27 amended I-schedule, filed at the same time as the Amended B22C,  
the parents are listed as dependents.

28 The debtors' tax returns are consistent with their original  
position -- they do not list the parents as dependents. See 2008  
federal and state income tax returns, filed April 14, 2009.

1       The debtors defend their strategy on the basis that the  
2 parents' only income is social security income, which is not to  
3 be included in the Form B22C. Under § 101(10A), "current monthly  
4 income" (which is the starting point for determining disposable  
5 income under § 1325(b)(2)) includes amounts paid by persons or  
6 entities other than the debtors, on a regular basis, for the  
7 household expenses of the debtor and his or her dependents, and  
8 excludes benefits received under the Social Security Act.

9       The former -- amounts contributed by third parties -- are to  
10 be listed on line 7 of the Form B22C. There is no indication in  
11 the Code or the official form of an exclusion of any particular  
12 type of income received by the third party and then contributed  
13 to the household. Thus, in this case, to the extent the parents  
14 were to be considered as members of the household, for purposes  
15 of computing the debtors' expense deductions, their contributions  
16 to the household income should also have been included, on line  
17 7. In other words, as to the third party, the income may be  
18 Social Security benefits, but as to the debtors, it is not; it is  
19 nothing more nor less than contributions from a third party.

20       The only evidence offered by the debtors in response to the  
21 Credit Union's present objection is this: "[Naly's parents] did  
22 not make regular contributions to household expenses during the  
23 six-month period prior to [the filing]." However, the Credit  
24 Union's records show that \$762 "from the US Treasury 310 (Supp  
25 Sec)" was deposited each month into an account on which debtor  
26 Naly Phonhlamoungdy was the primary account holder and her mother

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27  
28       7. Debtors' declaration, filed April 14, 2009.

1 was the joint account holder. The funds were then withdrawn and  
2 some were placed in other accounts of the debtors from which  
3 household expenses were paid.<sup>8</sup>

4 The debtors have offered no response to this evidence, other  
5 than the conclusion that the parents did not make regular  
6 contributions to the household expenses. They have not explained  
7 where the \$762 went each month after it was deposited or shown  
8 that the majority of the funds did not go to household expenses.

9 Virtually all the debtors' testimony and documents filed  
10 prior to the present objection are consistent with the conclusion  
11 that the parents' income and expenses were treated as separate  
12 from the debtors'. Thus, an Amended Form B22C, filed only in  
13 response to that objection, that includes the parents as  
14 household members for purposes of the expense deductions, but  
15 excludes their income from household income, is given little, if  
16 any, weight.

17 Returning the household size to its original six, the  
18 expenses on lines 24A and 24B drop from \$2,418 and \$456 back to  
19 their amounts on the original Form B22C, \$1,894 and \$342, for a  
20 total reduction in expenses of \$638. Adding this amount to the  
21 monthly disposable income shown on the Amended Form B22C,  
22 <\$553.24>, results in a positive number for disposable income.  
23 As the debtors have disposable income, their proposed three-year  
24 plan cannot be confirmed.

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28 8. Declaration of Roxanne T. Daneri, filed March 24, 2009.

1 III. CONCLUSION

2 For the foregoing reasons, the debtors' motion to confirm  
3 their first amended plan will be denied. It is unnecessary at  
4 this time for the court to decide any other issues raised by the  
5 Credit Union, such as the amounts deducted for the debtors' car  
6 payments.

7 The court will issue an appropriate order.

8 Dated: April 30, 2009

9 Robert S. Bardwil  
10 ROBERT S. BARDWIL  
11 United States Bankruptcy Judge  
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**CERTIFICATE OF MAILING**

I, Andrea Lovgren, in the performance of my duties as Deputy Clerk to the Honorable Robert S. Bardwil, mailed by ordinary mail a true copy of the attached document to each of the parties listed below:

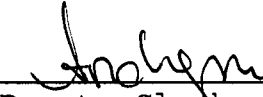
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\_\_\_\_\_  
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